

SERVICE DATE - JULY 7, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33290

SAULT STE. MARIE BRIDGE COMPANY--ACQUISITION AND OPERATION
EXEMPTION--LINES OF UNION PACIFIC RAILROAD COMPANY

Decided: July 5, 2000

On December 30, 1996, Sault Ste. Marie Bridge Company (SSMB), a Class III common carrier by rail, filed a notice of exemption under 49 CFR 1150.41, et seq. to acquire and operate approximately 220 miles of rail line of Union Pacific Railroad Company (UP) in the Upper Peninsula of Michigan and northern Wisconsin. Notice of the exemption was served and published on February 4, 1997. Consummation of the transaction was scheduled for January 24, 1997.¹

On February 14, 1997, United Transportation Union (UTU) filed a petition to reject the notice of exemption or to revoke the exemption.² SSMB replied to UTU's contentions in a pleading filed October 6, 1997. We will deny UTU's revocation request.

BACKGROUND

SSMB is a wholly owned subsidiary of Wisconsin Central Transportation Corporation (WCTC). WCTC also controls Fox Valley & Western Ltd. (FVW), a Class II rail common carrier that owns approximately 500 miles of rail line in Wisconsin, and Wisconsin Central Ltd. (WCL), a Class II rail common carrier that owns approximately 2,000 miles of rail line in Minnesota, Wisconsin, Michigan, and Illinois. UTU contends that WCL, not its affiliate SSMB,

¹ In a decision served January 24, 1997, the Chairman denied a petition for stay of the effectiveness of the notice of exemption filed by shippers Inland Steel Company (Inland) and LTV Steel Company, Inc. (LTV), which had voiced concerns about anticompetitive impacts of the transaction. With their stay request, Inland and LTV had filed a petition for rejection or revocation, which they subsequently supplemented. However, the shippers later requested permission to withdraw their petition, and, in a decision served December 31, 1998, the Board granted the shippers' request.

² Although the exemption went into effect on January 6, 1997, we will consider all of the arguments raised in connection with the revocation request.

is the true acquiring entity here, and that SSMB's only role is to help WCL avoid the labor protections mandated by 49 U.S.C. 10902(d) for short line purchases by Class II rail carriers.³

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation of the transaction at issue is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. Labor interests may raise issues concerning the appropriate level of labor protection in a petition for revocation. See 49 U.S.C. 10502(g); Simmons v. I.C.C., 900 F.2d 1023 (7th Cir. 1990). Moreover, to the extent that any party wishes to challenge the bona fides of a transaction, we retain the right to review the transaction to protect the integrity of our process. Minnesota Comm. Ry. Inc.--Trackage Exempt.--BN R.R. Co., 8 I.C.C.2d 31, 37 (1991). The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and that regulation of the transaction is necessary. See CSX Transp., Inc.--Aban.--In Randolph County, WV, 9 I.C.C.2d 447, 449 (1992); Mountain Laurel Railroad Company--Acquisition and Operation Exemption--Consolidated Rail Corporation, Finance Docket No. 31974 (STB served May 15, 1998, and Aug. 12, 1998) (Mountain Laurel). Upon review of the record before us, we conclude that UTU has failed to demonstrate that regulation of this transaction is necessary or that a sufficient basis exists for revocation of the exemption. Accordingly, we will deny the petition to revoke.

UTU's position is that this transaction is a sham because SSMB is a nonoperating shell company whose properties are actually operated by its Class II affiliate WCL, and because SSMB was designated to acquire this line solely to avoid the imposition of labor protection.⁴ Since, according to UTU, WCL is the real acquiring carrier here, affected employees are entitled to labor protection.

To determine whether a transaction is a sham designed to avoid labor protection, the Board uses a two-part "alter ego" test developed and employed by our predecessor, the Interstate Commerce Commission (ICC). Under that test, we consider whether an acquiring Class III carrier is purchasing the line for legitimate and substantial business reasons (such as insulation

³ UTU indicates that it shares the concerns raised by Inland and LTV regarding anticompetitive effects, but, as the shippers' interests have been satisfied, we will not address those concerns.

⁴ Under 49 U.S.C. 10902(d), Class II rail carriers that acquire or operate an extended or additional rail line under section 10902 are required to pay adversely affected employees one year of severance pay, while Class III rail carriers are not required to provide protective benefits for affected employees.

from financial risk) and whether the indicia of independence establish that the purchasing carrier is sufficiently independent of its parent or affiliated carriers.⁵

UTU asserts that SSMB has no rail lines, no employees, no rail properties near the lines to be acquired, and no legitimate business purpose here. The union also points to findings of the National Mediation Board (NMB) in an action concerning union representation to the effect that SSMB is included in the same single transportation system with WCL and FVW for purposes of the Railway Labor Act.⁶

SSMB responds, however, that it was designated to acquire the subject line in order to insulate the remainder of the Wisconsin Central System from the significant risk associated with the transaction. SSMB adds that it is financially independent of its affiliates, that it runs its own trains on its own lines with its own employees, and that its traffic and operational patterns are distinct from those of its affiliates. Further, the NMB report cited by UTU found that separate corporate identities have been maintained for financial purposes. Thus, the record here does not support a finding that SSMB's acquisition of the former UP line was a sham.

In any event, the record suggests that UTU's real interests have been satisfied. In a verified statement, J. Reilly McCarren, Executive Vice President and Chief Operating Officer of SSMB, WCL, and FVW, states:

Since the very beginning of this transaction, SSMB indicated that it would voluntarily pay one year income protection to UP . . . employees who accepted positions with SSMB or transferred to positions elsewhere on UP and experienced a decrease in income as a result. . . . While UP administers these payments, SSMB is reimbursing UP for such costs up to \$1 million. These income payments are being made today, and there have been no objections or complaints regarding our on-going implementation of that arrangement.

⁵ In a long line of cases, a number of which received judicial approval, the ICC consistently relied on financial independence as the primary factor in an analysis of the purchasing carrier's independence. Mountain Laurel, at 11-12, citing e.g., G&MV R. Co.--Exempt--Consolidated Rail Corp., 9 I.C.C.2d 1249, 1255 (1993), and New England Central Railroad, Inc.--Acquisition and Operation Exemption--Lines Between East Alburg, VT, and New London, CT, Finance Docket No. 32432 (ICC served Dec. 9, 1994), slip op. at 25, aff'd sub nom. Brotherhood of R.R. Signalmen v. I.C.C., 63 F.3d 638 (7th Cir. 1995) reh'g denied Sept. 12, 1995. Although Mountain Laurel discusses the situation in which a noncarrier subsidiary has been created to be the acquiring entity, the test is equally applicable where the acquiring carrier already exists.

⁶ In the Matter of the Applications of the Brotherhood of Locomotive Engineers and the United Transportation Union, NMB Case Nos. R-6506 and R-6507, report served June 5, 1997.

Thus, it appears that affected employees have received at least, if not more than, the level of severance pay UTU seeks here and would be able to obtain under section 10902(d). See Wisconsin Central Ltd.--Acquisition Exemption--Lines of Union Pacific R.R. Co., STB Finance Docket No. 33116 (STB served Apr. 17, 1997), aff'd in part and rev'd in part sub nom. Association of American Railroads v. Surface Transp. Bd., 162 F.3d 101 (D.C. Cir. 1998).⁷

In sum, we find that petitioner has not provided a sufficient basis for us to revoke SSMB's exemption, and we deny its petition seeking that relief.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU's petition to revoke is denied.
2. This decision will take effect on its service date.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary

⁷ Indeed, we note that in the time that has passed since the record in this proceeding closed, neither UTU nor any affected employee has contacted the Board to dispute Mr. McCarren's statements.